

April 24, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; *Misuse of Internet Protocol (IP) Captioned Telephone Service*, CG Docket No. 13-24

Dear Ms. Dortch:

Sorenson Communications, LLC and its subsidiary CaptionCall, LLC (collectively “CaptionCall”) herein submits a redacted version of the attached ex parte in the above-referenced proceedings.

CaptionCall requests pursuant to Sections 0.457 and 0.459 of the Commission’s rules, 47 C.F.R. §§ 0.457, 0.459, that the Commission withhold from any future public inspection and accord confidential treatment to the confidential, business sensitive information contained in the attached letter.

The Confidential Information constitutes highly sensitive commercial information that falls within Exemption 4 of the Freedom of Information Act (“FOIA”). Exemption 4 of FOIA provides that the public disclosure requirement of the statute “does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Because CaptionCall is providing commercial information “of a kind that would not customarily be released to the public,” this information is “confidential” under Exemption 4 of FOIA. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). Because this is a voluntary filing, if the Commission denies this request for confidential treatment, CaptionCall requests for its Confidential Information to be returned.

In support of this request and pursuant to Section 0.459(b) of the Commission’s rules, CaptionCall hereby states as follows:

1. Identification of the Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))

CaptionCall seeks confidential treatment with respect to the Confidential Information.

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2. Description of the Circumstances Giving Rise to the Submission (Section 0.459(b)(2))

CaptionCall met with Commission staff on April 20, 2017 regarding the above-captioned proceedings. The information was presented in order to illustrate the degree of hearing disability in CaptionCall's subscriber base.

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))

The portion of the ex parte for which confidential treatment is sought contains information that is commercial and a trade secret. This information constitutes highly sensitive commercial information "which would customarily be guarded from competitors." 47 C.F.R. § 0.457.

4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))

The information relates to CaptionCall's provision of IP CTS, and the market for such services is highly competitive.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))

The information provides a profile of CaptionCall customers, which could be used by competitors to target CaptionCall's customer base.

6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6))

CaptionCall does not make the Confidential Information publicly available in this form at this level of detail. This information would not be disclosed at this level of detail without a non-disclosure agreement or equivalent confidentiality obligation.

7. Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))

CaptionCall does not distribute the information for which confidential treatment is sought.

8. Justification of the Period During Which the Submitting Party Asserts That Material Should Not Be Available for Public Disclosure (Section 0.459(b)(8))

CaptionCall requests that the information remain confidential for two years, because its disclosure during that time could give CaptionCall's competitors insights into how to compete with CaptionCall or prejudice it in transactions.

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9. Any Other Information That the Party Seeking Confidential Treatment Believes May Be Useful in Assessing Whether Its Request for Confidentiality Should Be Granted (Section 0.459(b)(9))

Data subject to this request also would qualify for Exemption 4 of the Freedom of Information Act. Exemption 4 protects information that is (i) commercial or financial; (ii) obtained by a person outside of the government; and (iii) privileged or confidential. 5 U.S.C. § 552(b)(4).

Please contact me if you have any questions or require any additional information.

Sincerely,



John T. Nakahata
Counsel to CaptionCall

Attachment

cc: TRSReports@fcc.gov



April 24, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; *Misuse of Internet Protocol (IP) Captioned Telephone Service*, CG Docket No. 13-24

Dear Ms. Dortch:

On April 20, 2017, Scott Wood, General Counsel, and Bruce Peterson, Vice President of Marketing, both of Sorenson Communications, LLC and its subsidiary CaptionCall, LLC (collectively "CaptionCall"); Rebekah Goodheart of Jenner & Block, outside counsel to CaptionCall; and Walter E. Anderson and I of Harris Wiltshire & Grannis LLP, outside counsel to CaptionCall, met with Consumer and Governmental Affairs Bureau ("CGB") Chief Patrick Webre and Deputy Chief Karen Peltz Strauss; Robert Aldrich of the Consumer and Governmental Affairs Bureau; Eliot Greenwald, Michael Scott, and Susan Bahr of the Disability Rights Office of CGB; and Deputy Managing Director Dana Shaffer, regarding the above-referenced proceedings. We met separately with Zenji Nakazawa, Acting Public Safety and Consumer Protection Advisor to Chairman Pai, on the same subject matter.

During each meeting, CaptionCall's representatives discussed (1) the Commission's pending decision on rates for Internet Protocol Captioned Telephone Service ("IP CTS"), (2) eligibility standards for IP CTS, and (3) the development of Automatic Speech Recognition ("ASR") for use in IP CTS. CaptionCall agrees that, over the long term, the only sustainable course is to migrate nearly all IP CTS calls to an entirely ASR-based relay service, with human communications assistants needed only in circumstances that ASR cannot adequately handle. However, it will take some years before ASR technology evolves to that point of providing functionally equivalent service on a scalable and commercially robust level.

IP CTS Rates. As a threshold matter, CaptionCall understands the Commission's concern about growth in the Telecommunications Relay Service ("TRS") Fund. The Multi-State Average Rate Structure ("MARS") methodology, which relies on rates contained in contracts for the provision of intrastate traditional CTS, has increased the IP CTS rate each year. After 2013, intrastate minutes of use for traditional CTS began declining, which may be driving these increases in the MARS rate. CaptionCall recognizes that changes to the method of determining IP CTS rates may be necessary.

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At the same time, the Commission must ensure that IP CTS is “available to the extent possible” and “in the most efficient manner,” so that IP CTS users “pay rates no greater than the rates paid for functionally equivalent voice communication services,” and the IP CTS rate does not “discourage or impair the development of improved technology.”¹

As CaptionCall has long maintained, a market-based rate-setting mechanism is the best way for the Commission to honor each of these mandates. As such, the MARS plan, which is based on competitively bid contract rates, is structurally superior to an “allowable cost” mechanism that arbitrarily excludes many of the actual costs of providing IP CTS and depends on error-prone determinations by regulators. As a result, to maintain the market-based features of MARS, while taking the IP CTS rate off of its upward trajectory, the Commission could initialize a price cap using the average MARS rates from 2011, 2012, and 2013, then apply a gradual 0.5% annual reduction, which was the initial X-factor that the Commission used for IP Relay.

Using the average MARS rate from 2011-2013 would return IP CTS to the average MARS rate in the period before CTS minutes began to decline in 2014.² This approach would yield a rate of \$1.7746, which is \$0.1582 below the projected MARS rate for 2017,³ with a corresponding savings of \$64 million from projected 2017 IP CTS expenditures under the MARS plan.⁴

If the Commission nevertheless does choose an “allowable cost” mechanism, it cannot set the rate using the average “allowable costs” reflected in RolkaLoube’s (“RL”) most recent IP CTS data,⁵ which do not accurately represent industry-wide costs. IP CTS providers have dramatic differences in their cost structures, likely due to subcontracting arrangements. Indeed, CaptionCall operates a fully integrated business model, whereas other IP CTS providers subcontract substantial portions of their operations to a third party. These arrangements require the providers to pay subcontracting fees, which are reflected in the opaque “Other” category in RL’s data.⁶

¹ 47 U.S.C. §§ 225(b)(1), (d)(1)(D), (d)(2).

² See RolkaLoube, 2017-18 TRS Filing Presentation, at 8 (Mar. 29, 2017), *available at* http://media.wix.com/ugd/455e4d_ea792561fd72442090ec35c37c591e01.pptx?dn=advisory%20council%20draft%20presentation.pptx. During the meetings, CaptionCall presented a version of two slides from this deck, with only changes to the formatting. The modified slides are attached to this letter.

³ See *id.* at 5.

⁴ RL currently projects a demand of 402,308,884 IP CTS minutes for the upcoming fund year. See *id.* A \$0.1582 per minute reduction would thus yield a savings of \$63,645,265.40.

⁵ See *id.* at 13.

⁶ See *id.*

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Significantly, though it is not feasible, without further explanation from the providers, to determine exactly the costs that fall into the “Other” category, there is a strong likelihood that those costs include substantial intellectual property licensing fees. By contrast, though CaptionCall has devoted significant resources to the development of highly valuable intellectual property, CaptionCall’s “allowable cost” data—and, by extension, RL’s industry-wide data—do not include *any* imputed costs for CaptionCall’s intellectual property.

It seems clear that if CaptionCall’s intellectual property were held by a third party (which could be accomplished through a spinoff to shareholders, for example, or a sale to a third party) and then CaptionCall negotiated an intellectual property license fee with that third party, those costs would be reportable and allowable. Accordingly, failing to include an imputed cost component for CaptionCall’s self-provisioned intellectual property when calculating industry average costs, simply because CaptionCall relies on its own intellectual property instead of licensing it from a third party, would plainly be arbitrary and capricious. Such an average would not be a true average, as it would not be based on the sum of all allowed costs across all providers. While CaptionCall is still conducting a valuation of its intellectual property, it is much more likely that the industry average costs, including the value of both third-party licensed and self-provisioned intellectual property and assuming that other providers’ subcontracting fees contain only allowable costs, is closer to \$1.60 per minute, as compared to the approximately \$1.30 per minute reported by the Administrator.

To address this issue, any cost-based formula must, at minimum, incorporate an imputed value for CaptionCall’s (and any other integrated provider’s) intellectual property. Aside from being arbitrary and capricious in violation of the Administrative Procedure Act (APA), excluding the value of integrated providers’ intellectual property would violate three separate Americans with Disabilities Act (“ADA”) mandates contained in Section 225:

- First, the exclusion would disincentivize the integrated provision of IP CTS. Instead, providers, in order to realize the value of their intellectual property, would be forced to divest their intellectual property to separate entities, then negotiate license fees. This plainly inefficient structure would violate the ADA’s mandate that the Commission ensure TRS is provided “in the most efficient manner.”⁷
- Second, this structure would force IP CTS providers to recoup the value of their intellectual property—if at all—from end users. But because an IP CTS customer must already purchase both traditional telephone service (for the voice component of IP CTS) and a broadband connection (which carries the captions), imposing additional end-user costs would violate the mandate that users “pay rates no greater than the rates paid for functionally equivalent voice communication services.”⁸

⁷ 47 U.S.C. § 225(b)(1).

⁸ 47 U.S.C. § 225(d)(1)(D).

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- Third, this structure may also discourage providers from developing intellectual property, for fear that they will never realize its value. This would violate the ADA's mandate that the Commission not "discourage or impair the development of improved technology."⁹

In addition, the Commission should not devolve responsibility for compensating IP CTS providers to the states. Doing so would essentially eliminate IP CTS, as providers cannot offer service without funding for both interstate and intrastate traffic, and it is unlikely that all states could or would fund the intrastate portion of IP CTS. Thus, this would violate the Commission's ADA mandate to ensure IP CTS is "available, to the extent possible."¹⁰

Moreover, the ADA requires that the Commission separate costs "[c]onsistent with the provisions of section 410."¹¹ In turn, Section 410 requires that the Commission refer separations issues to a Federal-State Joint Board.¹² Because the Commission currently uses the MARS formula to set rates for traditional TRS services, it currently does not apply cost separations even for TTY-based TRS and traditional CTS. For telephone companies, separations rules have been frozen since 2000, and thus there is no basis for assuming that they would be appropriate for separating the costs of IP CTS between interstate and intrastate traffic.

Indeed, IP CTS presents unique separations challenges that would need to be addressed. IP CTS providers are generally not in the call-signaling stream. As a result, IP CTS providers frequently cannot determine the location of one end of a call. For outgoing calls, the IP CTS provider can see only the string dialed by the user, which in many cases (such as calls to voicemail, speed-dialing, and calls in an institutional setting) may not constitute a North American Numbering Plan ten-digit number and thus not allow for a jurisdictional determination. For incoming calls, IP CTS providers must rely on caller ID information, which may not be available for any number of reasons, including if the recipient picks up on the first ring, if the recipient picks up the captioned phone after receiving the call on a separate phone, or if the caller blocks caller ID. Accordingly, if the Commission does choose to force states to fund the intrastate portion of IP CTS, it must first refer the separations issue to a Joint Board.

IP CTS Eligibility. CaptionCall supports the return of more rigorous eligibility standards—beyond self-certification—back into the rules. CaptionCall also believes that, in line with the 2013 interim order, third-party hearing-health professionals are best positioned to evaluate a consumer's need for IP CTS. These professionals are trained to evaluate hearing loss, are subject to strict codes of ethics, and are motivated to help their patients find suitable accommodations for the myriad problems that hearing loss causes—use of the telephone in particular. CaptionCall is ready and willing to work with the Commission, consumer groups,

⁹ 47 U.S.C. § 225(d)(2).

¹⁰ 47 U.S.C. § 225(b)(1).

¹¹ 47 U.S.C. § 225(d)(3)(A).

¹² See 47 U.S.C. § 410(c).

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hearing-professional groups, and any other interested stakeholders, to refine the professional certification process.

There is no reason to believe—and, indeed, no evidence to suggest—that third-party professionals are certifying individuals who do not need IP CTS. Though the FCC’s rules do not currently require professional certifications, CaptionCall has continued to require them for each new customer. And across CaptionCall’s customer base, *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL***** have hearing aids or a cochlear implant. Within the remainder, some customers are too disabled to be helped by a hearing aid or cochlear implant, while some cannot afford hearing aids or have otherwise chosen not to get them. This evidence demonstrates that all of CaptionCall’s customers suffer from significant hearing loss, and they have turned to captioned telephone service in order to use the telephone in the same way that fully hearing persons can.

For each new CaptionCall customer who receives a CaptionCall phone at no cost, a trained professional has certified, under penalty of perjury, that “the individual has hearing loss that necessitates the use of captioned telephone service.” CaptionCall is simply not aware of—and the record does not contain—any evidence that hearing-health professionals are deliberately violating their codes of ethics by signing their names to certifications for customers who do not actually need IP CTS.

Furthermore, the Commission will face legal and practical obstacles if it attempts to push the role of certifying IP CTS customer eligibility to the states. The Commission cannot mandate that state governments screen consumer eligibility for IP CTS, as doing so would constitute unconstitutional commandeering of state government officials.¹³ But if the Commission adopts a “voluntary” screening process, it is highly unlikely that all—or even close to all—states will participate. As the Commission is likely aware, some states lack any equipment distribution program at all. And of the states with equipment distribution programs, many will likely lack capacity to process the number of consumers who will seek IP CTS certifications. Where such states do opt into an IP CTS certification function, the resulting consumer frustration and discouragement that will arise from long queues will create a barrier to IP CTS access, in violation of the ADA. Moreover, the FCC will need to create a certification process for consumers in states that do not opt in, and it would be difficult to justify why all consumers could not simply follow the FCC’s alternative process, in lieu of waiting for a certification from a backlogged or difficult-to-reach state program.

Promoting the Development of ASR. As the number of IP CTS customers continues to grow, and as ASR technology improves, CaptionCall recognizes that, eventually, ASR may become the “most efficient manner” of providing IP CTS, at least for a large percentage of IP CTS calls. But though ASR technology may have improved significantly, ASR alone cannot yet approach the quality of telephone-conversation captioning that ASR with human intervention can achieve.

¹³ See generally *Printz v. United States*, 521 U.S. 898 (1997).

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Indeed, telephone conversations present numerous difficulties that ASR must evolve to handle effectively. For example, telephone captions must include proper punctuation, handle disfluencies, indicate non-verbal sounds, parse overtalk and double-talk, overcome poor data connections, adjust for differences in volume, compensate for different speaking speeds, handle idiomatic speech, and caption languages other than English, just to name a few issues. As the Commission continues to develop quality metrics for IP CTS providers, it should also test the quality of ASR-only captioning based on all variables that could commonly arise across the millions of telephone conversations ASR may eventually be asked to handle. If the computers cannot provide functionally equivalent service based on objective criteria—and today they cannot—then the Commission cannot, consistent with the ADA, transition to ASR.

The Commission, however, can act now to create a stable environment for ASR investment. ASR is not likely to be a “free in the handset” feature until, if at all, much later in its development and maturation. It is likely that because of the needed computing power, ASR capable of replacing human relay would be network-based rather than native in handsets. In that case, there will be substantial investment needed to restructure backend systems and call management to sort calls on which ASR can be used from calls that need human intervention.

The Commission can take several steps to ensure that providers have the proper incentives to invest in the development and deployment of ASR-only captioning technologies. First, the Commission should make clear that relay provided exclusively with ASR is still TRS and eligible for compensation from the Fund. The statutory definition of TRS is technology neutral and encompasses both human and machine-based relay services.¹⁴

Second, all investments in research and development or implementation of ASR should be “allowable costs” regardless of whether the work relates to a provider’s network or to endpoints. Even if the Commission does not adopt an “allowable cost” rate-setting methodology, this sends an important message that the Commission considers these to be investments critical to the long-term provision and sustainability of IP CTS, and thus will be eligible for compensation from the Fund.

Third, if and when the Commission adopts a separate rate for ASR-only calls, the Commission should ensure that such calls receive a higher margin (though at a lower per-minute rate) than human-assisted IP CTS calls. That way, providers will have economic incentives to shift their traffic to ASR-only captioning technologies. By setting a rate structure in this manner, the Commission can avoid setting an arbitrary cut-off for determining when ASR becomes

¹⁴ See 47 U.S.C. § 225(a)(3) (“The term ‘telecommunications relay services’ means telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.”).

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adequate, provided that the Commission maintains overall standards for latency and accuracy that apply regardless of whether a call is provisioned through ASR or human-based relay.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata

Counsel to CaptionCall, LLC

cc: Zenji Nakazawa
Patrick Webre
Karen Peltz Strauss
Dana Shaffer

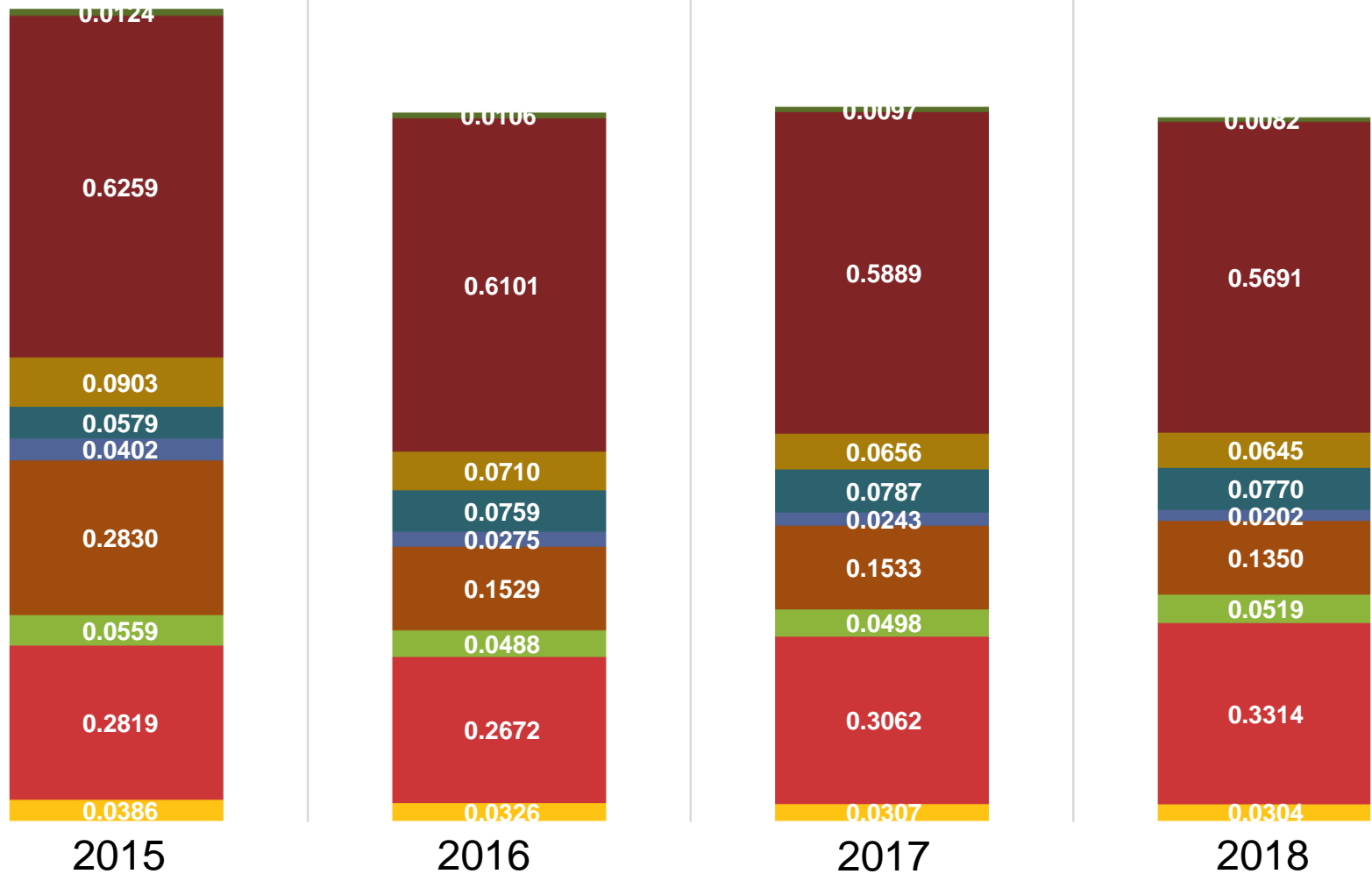
Robert Aldrich
Eliot Greenwald
Michael Scott
Susan Bahr

Attachment

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IP-CTS COST TRENDS:2015-2018

- Facilities
- Indirect
- Outreach
- CA Related
- Depreciation
- Other
- Non-CA Relay Center
- Marketing
- Return on Investment



IP-CTS Cost Trend Data

Category	2015	2016	2017	2018
Facilities	0.0386	0.0326	0.0307	0.0304
CA Related	0.2819	0.2672	0.3062	0.3314
Non-CA Relay Center	0.0559	0.0488	0.0498	0.0519
Indirect	0.2830	0.1529	0.1533	0.1350
Depreciation	0.0402	0.0275	0.0243	0.0202
Marketing	0.0579	0.0759	0.0787	0.0770
Outreach	0.0903	0.0710	0.0656	0.0645
Other	0.6259	0.6101	0.5889	0.5691
Return on Investment	0.0124	0.0106	0.0097	0.0082
Total Cost	1.4863	1.2965	1.3071	1.2876